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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 185

BEDFORD NUGENT CORPORATION, AN INDIANA CORPORATION,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Bedford-Nugent Corporation, an Indiana corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit entered on March 3, 1966, is reported in ..... F. 2d ..... (CCA 7 1966); 53 LC 11,089 and appears at Appendix A, pages 19 to 26 attached to this petition. The judgment, along with the findings of fact and conclusions of law of the District Court entered on July 7, 1965, appears at Appendix B, pages 27 to 30.

QUESTION PRESENTED.

Whether picketing and other activity of a labor organization which fall within Section 8(b)(4)(i) and (ii) of the National Labor Relations Act, as amended, and is directed at customers and employees of customers of a primary employer is, nevertheless, protected primary activity under the proviso to subsection (B) of Section 8(b)(4), if conducted at the primary situs of the labor dispute.

JURISDICTION.

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254(1).

STATUTE INVOLVED.

Section 8(b)(4) of the National Labor Relations Act, as amended, Title 29 U. S. C. Section 158(b)(4), insofar as here pertinent, provides as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents . . .
>
> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or

otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of section 159 of this title. *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

Section 303 of the Labor Management Relations Act, as amended, Title 29 U. S. C. Section 187, provides as follows:

"(a) It shall be unlawful for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8 (b) (4) of the National Labor Relations Act, as amended.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the cost of the suit."

STATEMENT.

At all times material hereto Petitioner was engaged in the business of extraction and preparation of river sand and gravel for sale locally and in interstate commerce. Petitioner's operations were conducted at premises in Evansville, Indiana, in Rockport, Indiana, and in Henderson, Kentucky. The Respondent Union, which was not the certified bargaining representative of Petitioner's employees, picketed the Petitioner's premises at each of the locations during the period of September 26, 1961, through November 7, 1961. This picketing was joined in by some of Petitioner's employees who were members of the Union. In addition to the picketing the Union engaged in other activities at the primary sites. Said activities included 1) the placing of nails and tacks at the entranceways to Petitioner's premises, 2) the shooting of an air pistol at the radiators and windshields of approaching customers, 3) the blocking of entranceways by pickets who refused to stand aside, and 4) the threatening of physical injury and property damage to customers who attempted to enter or did enter Petitioner's premises. The aforesaid activities of Respondent Union had the effect of deterring a substantial number of customers from entering Petitioner's premises. The picketing and the above detailed activities of the Union were engaged in in part for the purpose of inducing customers to refuse to transport or otherwise handle Petitioner's goods and materials, or to perform any services, or in order to threaten, coerce or restrain plaintiff's customers. The object of the activities was to force such customers to cease doing business with Petitioner and to force Petitioner to recognize the Union as the representative of Petitioner's employees.

Petitioner brought this action in the District Court under

the provisions of Section 303 of the Labor Management Relations Act, as amended, 29 U. S. C. Section 187, to recover damages from the Respondent Union. The damages were alleged to have been occasioned by the aforesaid activities of the Union claimed to be an unfair labor practice under the provisions of Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. A. Section 158(b)(4). The case was heard by the Court without a jury. The Court made and entered findings of fact and conclusions of law. Based on the facts found, the Court concluded that although the activity of the Union clearly fell within clauses (i) and (ii) of Section 8(b)(4) such activity was, nevertheless, excluded from the unfair labor practices defined by that section because it was within the protected area of primary picketing carved out in the proviso to subsection (B) of Section 8(b)(4). The Court bottomed its decision on *United Steelworkers of America* v. *National Labor Relations Board*, 376 U. S. 492, 84 S. Ct. 899 (1964). A judgment order dismissing the action was entered and the Petitioner appealed to the Seventh Circuit Court of Appeals. On appeal, the judgment order was affirmed.

REASON FOR GRANTING THE WRIT.

An Important Question of Federal Law Has Been Decided By a Circuit Court of Appeals Which Has Not Been, But Should Be, Settled by This Court; or Which Has Been Decided in a Way Probably in Conflict With Applicable Decisions of This Court.

It is Petitioner's position that its petition for a writ should be granted because of the importance of the Federal question presented herein, to-wit; whether a labor union, not certified as the bargaining representative of a primary employer's employees, may engage in activities proscribed by Section 8(b)(4)(i) and (ii) of the National Labor Relations Act, and aimed directly at customers of the primary employer attempting to enter the primary employer's premises, and yet be protected under the proviso to Subsection B.

The majority opinion of the Court of Appeals in the present case correctly stated that the factual findings of the District Court are undisputed. As stated in the opinion, these findings are as follows:

> "Plaintiff (Petitioner here) is engaged in the business of extraction and preparation of river sand and gravel for sale locally and in interstate commerce. Its operations are conducted at premises in Evansville, Indiana, in Rockport, Indiana, and in Henderson, Kentucky. The Union, which was not the certified bargaining representative of Plaintiff's employees, picketed the Plaintiff's premises at each of the three locations during the period of September 26, 1961, through November 7, 1961, and some of Plaintiff's employees who were members of the Union joined in the picketing. In addition to the picketing the Union engaged in other activities at the primary sites. Said activities included

the placing of nails and tacks at the entranceways to Plaintiff's premises, the shooting of an air pistol at the radiators and windshields of vehicles of approaching customers, the blocking of entranceways by pickets who refused to stand aside, and the threatening of physical injury and property damage to customers who attempted to enter or did enter Plaintiff's premises. Although the Union activities did not stop all customers from entering Plaintiff's premises, it did have the affect of deterring a substantial number. The picketing and the above detailed activities of the Union were engaged in in part for the purpose of inducing customers to refuse to transport or otherwise handle Plaintiff's goods or materials, or to perform any services, or in order to threaten, coerce or restrain Plaintiff's customers. The object of the activities was to force such customers to cease doing business with Plaintiff and to force Plaintiff to recognize the Union as the representative of Plaintiff's employees." Appendix A, page 21.

As can be seen from the above findings of fact, the Court of Appeals agreed with the District Court that the activities of Respondent Union were within the proscription of Section 8(b) (4) (i) and (ii),

"to . . . induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, . . . a refusal in the course of his employment to use, . . ., transport, or otherwise handle, or work on any goods, . . ., or materials, or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce. . .".

Likewise, it was found that the activities of Respondent Union had the object, illegal under Subsection (B) of Section 8(b) (4), of

"forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manu-

> facturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees, unless such labor organization has been certified as the representative of such employees. . .".

However, both the District Court and the Court of Appeals held that Respondent's activities, though clearly within the provisions of 8(b) (4) (i) and (ii) and engaged in for the objectives covered by Subsection (B) are protected by the proviso thereto. *United Steelworkers of America* v. *National Labor Relations Board,* 376 U. S. 492 (1964), was regarded as controlling. Petitioner contends that the *Steelworkers* case and *Electrical Workers Local No. 761* v. *NLRB* (the *General Electric* case), 366 U. S. 667, which latter case was the foundation for the *Steelworkers* decision, are distinguishable from the case at bar and should not control. Petitioner's primary argument in support of this contention is that the inducements, threats, coercion and restraint complained of were not directed at employees "furnishing day-to-day services" for the primary employer, as in *Steelworkers* and *General Electric,* but were directed at Petitioner's customers and employees of customers attempting to purchase goods and materials for their own use. Petitioner also urges that the confinement by Respondent of its activities to Petitioner's premises is not the all conclusive factor, as held by the courts below, in whether such activities are prohibited secondary activities or protected primary activities. The location of the picketing and other activities is an important but not decisive factor. More important is the question of whether such activities were intended to force or require Petitioner's customers to cease doing business with Petitioner.

It Is an Unfair Labor Practice for a Labor Organization to Engage in the Activities Proscribed by Section 8(b)(4)(i) and (ii) of the National Labor Relations Act, for the Purposes Set Forth in Subsection (B) Thereof, and Directed at Customers of a Primary Employer, Who Do Not Furnish Day-to-Day Services Essential to the Primary Employer's Regular Operations.

Petitioner contends that the activities of Respondent Union in inducing, threatening, coercing and restraining Petitioner's customers for the object of forcing such customers to cease doing business with Petitioner and to force Petitioner to recognize Respondent as the representative of Petitioner's employees are not excluded from Section 8(b) (4) (i) and (ii) by the proviso thereto. As contended by Petitioner, the activities complained of are not within the ambit of the holdings in the *Steelworkers* and *General Electric* cases because they were not directed at employees "furnishing day-to-day services" for the primary employer.

The *Steelworkers* case involved picketing at an entrance used exclusively by railroad personnel, to a railroad spur located on a right-of-way owned by the railroad and adjacent to the premises of the primary employer, Carrier Corporation. The picketing activity began when employees of the railroad moved empty boxcars through the gate for future use by Carrier and became intensified after the switching engine picked up loaded boxcars which Carrier wanted shipped out and attempted to move these cars back out through the gate.

In reversing the decision of the Court of Appeals for the Second Circuit, the Supreme Court held that:

> "... Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day services essential to the plant's regular operations." 376 U. S. 499.

The Court of Appeals in the present case, after quoting the above-cited language from the *Steelworkers* decision, concluded that:

> "Customers who seek entrance to the primary employer's premises are likewise neutrals who approach the situs with a mission 'contributing to the operations' of the primary employer." Appendix A, page 23.

The rationale for this conclusion was that:

> "Customers are essential to the continued operation of the Plaintiff's (Petitioner's) business. To deter them from entering the Plaintiff's premises is certainly an application of economic pressure at the primary situs." Appendix A, page 23.

Petitioner agrees that customers and employees of customers are indeed neutrals in a labor dispute between the primary employer and a labor organization; however, the classification of customers as "contributing to the operation of the primary employer" is an improper extension of the holding in the *Steelworkers* case. It is indeed fallacious reasoning to say that customers contribute to the operations of a primary employer simply because they are "essential to the continued operation of the primary employer's business." Petitioner's customers approached the picket line at Petitioner's places of business for the purpose of making purchases from Petitioner for their own use, and not to make deliveries to, or perform services for, the primary employer. To show how unfounded is the reasoning of the Court of Appeals, Petitioner would point out that in numerous cases the Board and the Courts have held inducements, threats, and coercion aimed at employees performing construction work on the premises of a primary employer to be 8 (b) (4) violations. *United Brick and Clay Workers* v. *Deena Artware, Inc.* (1952, CA 6), 198 F. 2d 637, cert. den. 344 U. S. 897, 97 L.ed. 694, 73 S. Ct. 277; *Walters* v. *International Assoc. of Plumbers & Steamfitters* (1963,

CA 6), 323 F. 2d 578. These neutral construction workers certainly could be performing work "essential to the continued operation of the primary employer's business," yet no one would argue that such employees should be put in the same category with those performing conventional maintenance work, as in *General Electric*, or with railroad switchmen furnishing day-to-day service for the primary employer, as in *Steelworkers*.

In the *Steelworkers* case this Court agreed with the dissent of Judge Lumbard in the Second Circuit and quoted with approval the following language from the dissenting opinion:

> "In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to accomplish no more than picketing outside one of Carrier's own *delivery entrances* might have accomplished. Because the fence surrounding the railroad's right-of-way was a continuation of the fence surrounding the Carrier plant, there was no other place where the Union could have brought home to the railroad workers *servicing Carrier* its dispute with Carrier."

The picketing and other activities engaged in by Respondent Union in this case were directed not at "employees of neutral delivery men furnishing day-to-day services essential to the plant's regular operations" but at Petitioner's customers attempting to enter the premises of Petitioner to purchase sand and gravel products from Petitioner. It is clear that Union activity aimed at secondary employees, such as delivery men, performing services in furtherance of the primary employer's normal operations is quite dif-

ferent from activity aimed at customers of the primary employer attempting to purchase products for their own use.

General Electric is not in conflict with Petitioner's position. Mr. Justice White, in the *Steelworkers* opinion, regarded the result reached in *General Electric* to largely govern the *Steelworkers* decision. 376 U. S. 496. The *General Electric* case involved picketing by a Union engaged in a strike against the primary employer, of a separate gate on the primary employer's premises, marked and set aside for employees of independent contractors performing a variety of tasks, such as: (1) construction work on new building; (2) installation and repairing of ventilating and heating equipment; (3) retooling and rearranging operations; and (4) general maintenance work. 366 U. S. 669. After surveying the course of Board and Court decisions construing the provisions of Section 8 (b) (4), Mr. Justice Frankfurter concluded that "If a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." 366 U. S. 681. The *Bedford-Nugent* case differs on the *key question*. Here, the coercion was directed against *customers* who desired to purchase the primary employer's products for *their own use*. The *General Electric* case was remanded to the Board for a determination as to the extent to which the separate gate was used "by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric." 366 U. S. 682.

In his opinion in the *General Electric* case, Mr. Justice Frankfurter quoted the following language from an Analysis of the proposed 1959 amendments to 8 (b) (4) (A) pre-

pared by Senator Kennedy and Representative Thompson, contained in 105 Cong. Rec. 16589, 366 U. S. 681:

> "The proviso was directed against the fear that the removal of 'concerted' from the Statute might be interpreted so that 'the picketing at the factory violates Section 8 (b) (4) (A) because the pickets induce the truckdrivers employed by the trucker not to perform their usual services, where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike'."

The above quoted legislative history of the 1959 amendments states that the proviso was intended to prevent picketing of *delivery men* at the primary premises from being construed as violative of Section 8 (b) (4) (A). Of course, delivery men do perform essential services in furtherance of the primary employer's normal business operations; however, such services are quite different from attempts by customers to do business with the primary employer.

The Decisive Factor in a Determination of Whether Picketing and Other Activity Violates Section 8(b)(4) Is Not the Location But Whether an Object of the Activity Is to Produce an Illegal Effect.

The lower court found the Union activity to be protected *only* because it took place at Petitioner's premises. After summarizing the pertinent facts of the case, the following comment was made:

> "It is apparent from the Court's factual findings that this case involves only picketing and activities at the premises of the employer. It does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines at the employer's premises." Appendix A, pages 21-22.

In a series of cases decided during the past fifteen years, this Court has departed from the Board's earlier position, enunciated in *United Electrical Workers* (Ryan Construction Corp.), 85 NLRB 417, that any picketing around the situs of a primary employer is excluded from the provisions of Section 8 (b) (4).

In *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, this Court based its decision, *not solely upon the location of the picketing* but upon the lack of "concerted activity."

> *"The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive.* The picketing was directed at the Kaplan employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by Section 8 (b) (4). Insofar as the Union's efforts were directed beyond that and toward the employees of anyone other than Kaplan, there is no suggestion that the Union sought concerted conduct by such other employees." 341 U. S. 671.

The rationale of the *Rice Milling* case did not survive the 1959 amendments, which eliminated the requirement for "concerted" action under Section 8 (b) (4). Nevertheless, the basic approach to the case had a definite effect upon subsequent construction of the Statute. The location of picketing at the primary situs no longer constituted an exemption from the operation of Section 8 (b) (4). The intent or object of the Union activity became the primary test of its legality when neutrals were encouraged, threatened or coerced to cease doing business with the primary employer.

Three other cases decided by the Court on the same day as the *Rice Milling* case solidified the concept of "intent" or "object" as the principal criterion for finding an 8 (b) (4) violation. In *NLRB* v. *Denver Building and Construc-*

tion Trades Council, 341 U. S. 675; *International Brotherhood of Electrical Workers, Local 501* v. *NLRB*, 341 U. S. 694; and *Local 74, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 341 U. S. 707, the Court approved the Board's findings of Section 8 (b) (4) (A) violations. In each of these cases, this Court found 8 (b) (4) violations, notwithstanding that *all* activity was at the primary premises.

In the *Denver* case, the Court stated, at page 685,

> "We now reach the merits. They require a study of the *objectives* of the strike and a determination whether the strike came within the definition of an unfair labor practice stated in Section 8 (b) (4) (A)."

Again it was stated by the Court, at page 687,

> "We must first determine whether the strike in this case had a proscribed *object*."

The *Rice Milling* case was distinguished on the ground that "it (the Union) did not encourage concerted action by the customer's employees to force the customer to boycott the mill." The clear inference is that a violation of Section 8(b)(4)(A) would have been found in *Rice Milling* if the union had encouraged "concerted" action by the customers of the mill to cease dealing with the mill.

Mr. Justice White in the *Steelworkers* opinion apparently recognized the proposition that the location of picketing activity is not the decisive factor when he said:

> "The location of the picketing is an important but not decisive factor, ..." 376 U. S. 499.

In *Local 20, Teamsters, Chauffeurs & Helpers Union, etc.* v. *Lester Morton* (1964), 377 U. S. 252, the inducement of customers to cease doing business with the primary employer was held to be violative of Section 303. The Court of Appeals in the case at bar held the *Morton* case to be inapplicable because the contacts were made by the

Union representatives with the O'Connel employees at sites away from the primary picket line. Appendix A, page 24. To quote the Seventh Circuit in regard to the Union activity in the *Morton* case:

> "Such activity was secondary and not affected by the proviso to subsection (B). And it was the away from the primary situs feature of the activities which was controlling as to the O'Connel phase of the Morton case." Appendix A, page 24.

Although the District Court opinion in the *Morton* case does mention the "away from the primary situs" facts, 200 F. Supp. 659, nothing in the opinion indicates that the location of the activities was considered to be decisive. Likewise, these facts were not relied upon by the Court of Appeals in the *Morton* case. 320 F. 2d 505. This Court did not even mention these so called "controlling" facts when affirming the award of damages based upon the O'Connel incidents. 377 U. S. 252. The basis for this Court's reversal of the *Morton* judgment, insofar as it pertained to Union contacts with Launder & Son, Inc., another of the plaintiff's customers, is distinguishable because such contacts were with Launder management and not its employees. At the time that the activities complained of in *Morton* occurred, Section 303(a) proscribed only inducement or encouragement of "the employees of any employer." This limitation of the Act's provisions to employees only was changed by the 1959 amendments which added subsection (ii) to Section 8(b)(4) "to threaten, coerce or restrain *any person* engaged in commerce or in an industry affecting commerce," where the object of such action is proscribed by subsection (B).

Thus, nothing contained in either the District Court, Court of Appeals or Supreme Court opinions in the *Morton* case is indicative of the location of the picketing being regarded as decisive.

For other cases holding the object or intent of Union picketing or other activity aimed at secondary employees to be the prime factor in determining whether such activity is proscribed by Section 8(b)(4) see: *United Brick and Clay Workers of America, et al.* v. *Deena Artware, Inc.* (CA5 1952), 198 F. 2d 637; *Construction and General Laborers Local Union No. 438, AFL-CIO* v. *Hardy Engineering and Construction Company, Inc.* (CA5 1965), 354 F. 2d 24; and *Superior Derrick Corp.* v. *NLRB* (CA5 1960), 273 F. 2d 891, 896, cert. den. 364 U. S. 816.

To recapitulate, Petitioner asserts that the District Court and the Court of Appeals have misapplied and overextended the holdings of the *Steelworkers* and *General Electric* cases to the facts of this case. If the decision in this case is allowed to stand, a labor organization may, with impunity and practically without limitation, insofar as Federal labor law is concerned, threaten, coerce and restrain customers of a primary employer for the object of forcing such customers to cease doing business with the primary employer, so long as the Union activity is confined to the premises of the primary employer.

CONCLUSION.

For the foregoing reasons Petitioner respectfully asks that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

September Term, 1965—January Session, 1966

No. 15352

BEDFORD-NUGENT CORPORATION, an Indiana corporation,
Plaintiff-Appellant.

vs.

CHAUFFEURS, TEAMSTERS and HELPERS, LOCAL UNION No. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana.

March 3, 1966.

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* Bedford-Nugent Corporation, plaintiff-appellant, brought this action in the District Court under the provisions of Section 303 of the National Labor Relations Act, as amended (29 U. S. C. A. § 187), to recover compensatory damages from the defendant-appellee Union[1]

1. Chauffeurs, Teamsters and Helpers, Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The damages are alleged to have been occasioned by activity of the Union charged to be an unfair labor practice under the provisions of Section 8 (b) (4) of the Act (29 U. S. C. A. § 158 (b) (4)).[2] The cause was tried to the court without a jury. The court made and entered findings of fact and conclusions of law. On the basis of the facts found the court concluded that although the activity of the Union clearly fell within clauses (i) and (ii) of Section 8 (b) (4) it was excluded from the unfair labor practices defined by that section because it was within the protected area of primary picketing carved out in the proviso to subsection (B) of Section 8(b) (4). The court regarded *United Steelworkers of America* v. *National Labor Relations Board*, 376 U. S. 492, as dictating such conclusion. A judgment order dismissing the action was entered and the plaintiff appealed.

---

2. Insofar as here pertinent Section 8(b)(4) provides as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

The factual findings of the District Court are not challenged. Insofar as they are pertinent to the issue presented on appeal they may be summarized as follows. Plaintiff is engaged in the business of extraction and preparation of river sand and gravel for sale locally and in interstate commerce. Its operations are conducted at premises in Evansville, Indiana, in Rockport, Indiana, and in Henderson, Kentucky. The Union, which was not the certified bargaining representative of plaintiff's employees, picketed the plaintiff's premises at each of the three locations during the period of September 26, 1961, through November 7, 1961, and some of plaintiff's employees who were members of the Union joined in the picketing. In addition to the picketing the Union engaged in other activities at the primary sites. Said activities included the placing of nails and tacks at the entranceways of plaintiff's premises, the shooting of an air pistol at the radiators and windshields of vehicles of approaching customers, the blocking of entranceways by pickets who refused to stand aside, and the threatening of physical injury and property damage to customers who attempted to enter or did enter plaintiff's premises. Although the Union's activities did not stop all customers from entering plaintiff's premises, it did have the effect of deterring a substantial number. The picketing and the above detailed activities of the Union were engaged in in part for the purpose of inducing customers to refuse to transport or otherwise handle plaintiff's goods and materials, or to perform any services, or in order to threaten, coerce or restrain plaintiff's customers. The object of the activities was to force such customers to cease doing business with plaintiff and to force plaintiff to recognize the Union as the representative of plaintiff's employees.

It is apparent from the court's factual findings that this case involves only picketing and activities at the premises

of the employer. It does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines at the employer's premises.

Section 303 makes activity or conduct of a labor organization which is "defined as an unfair labor practice" by Section 8(b) (4) unlawful for the purpose of authorizing suit for damages in a United States district court against the labor organization by a person injured in his business or property by reason of such unfair labor practice.

The contested issue presented for our determination is whether the District Court erred in concluding that the activity and conduct of the Union did not constitute an unfair labor practice as defined in Section 8(b) (4).

Plaintiff contends in substance that because the picketing and accompanying activities here involved were directed in part at customers and employees of customers seeking entrance to the plaintiff's premises the Union's conduct is a secondary activity proscribed as an unfair labor practice and therefore unaffected by the proviso to subsection (B) of Section 8(b) (4). In this connection it is urged that *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton, d/b/a Lester Morton Trucking Co.*, 377 U. S. 252 is apposite and that *United Steelworkers of America* v. *National Labor Relations Board*, 376 U. S. 492, is distinguishable on the ground that the picketing held to be within the protected area of primary activity in *Steelworkers* was aimed at secondary employees who furnished day-to-day services essential to the primary employer's regular operations, rather than at employees of customers as in the instant case.

But an analysis of those two decisions in the light of the background and rationale furnished by *Local 761, International Union of Electrical, Radio & Machine Workers,*

AFL-CIO v. *National Labor Relations Board*, 366 U. S. 667 (the General Electric case), in which the Court took occasion to survey the cases dealing with picketing at both primary and secondary sites, convinces us that it is *Steelworks* which is controlling here and that *Morton* is distinguishable.

In *Steelworkers* it is stated (376 U. S. 492, 498-499):

> "We think *General Electric's* construction of the proviso to §8(b) (4) (B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations."

We think it obvious that customers and employees of customers who seek entrance to the primary employer's premises are likewise neutrals who approach the situs with a mission "contributing to the operations" of the primary employer. Customers are essential to the continued operation of the plaintiff's business. To deter them from entering the plaintiff's premises is certainly an application of economic pressure at the primary situs. We agree with the District Court that *Steelworkers* is dispositive of the issue here presented. Both the situs and the object of the picketing were primary and therefore the Union's con-

duct, although reprehensible, did not constitute an unfair labor practice as defined in Section 8(b) (4).

Plaintiff's reliance on *Morton* is misplaced. The facts there involved, as disclosed in the District Court's opinion (200 F. Supp. 653, 659 and 660), reveal that contacts were made by the union representatives with the employees of O'Connel Coal Company, a customer of the primary employer, not at the latter's premises but at sites away from the primary picket line. Such activity was secondary and not affected by the proviso to subsection (B). And it was the away from the primary situs feature of the activities which was controlling as to the O'Connel phase of the *Morton* case.

In concluding we note that in *Steelworkers* it was recognized (376 U. S. 492, 501-502) that primary picketing, excluded by the proviso to subsection (B) of Section 8(b) (4) from activity defined as an unfair labor practice, does not become illegal secondary activity because it is accompanied by threats and violence. The Court pointed out that the legality of violent picketing, if "primary", must be determined under other sections of the statute or under state law. And, the Court construed the proviso to §8(b) (4) as saving from the proscription of that section primary picketing which, as is in the case of the use of violence or other unlawful conduct, is forbidden by some other law. In this connection the Court reasoned (376 U. S. 492, 501-502):

> "Such picketing does not become illegal secondary activity when violence is involved but only when it interferes with business intercourse not connected with the ordinary operations of the employer. This is not to say, of course, that violent primary picketing is in all respects legal but only that it is not forbidden by §8(b) (4); it would escape neither the provisions of the federal law nor the local law if violative thereof.
>
> This is all, we think, that was intended by the proviso to §8(b) (4) which provides that nothing in sub-

> section (B) 'shall be construed to make unlawful, *where not otherwise unlawful*, any primary strike or primary picketing.' (Emphasis supplied.) It is possible to read this language to mean that the proviso does not save from proscription under §8(b) (4) union activity violative of other laws, but this interpretation would condemn as secondary conduct any and all picketing directed toward neutral employers so long as the conduct, as in the case of violence, was forbidden by some other law. In our view, the words 'where not otherwise unlawful' were inserted only to make clear that the proviso, while excluding the conduct from the §8(b) (4) sanctions did not also legalize it under other laws, state or federal. The legality of violent picketing, if 'primary,' must be determined under other sections of the statute or under state law."

Accordingly, redress for the unlawful aspect of such primary picketing must be found under the provisions of some law other than §303 which is designed to vest the federal district courts with jurisdiction of suits for damages against unions in but a limited class of unfair labor practices.

The judgment order of the District Court is affirmed.

AFFIRMED.

No. 15352

SCHNACKENBERG, *Circuit Judge*, dissenting.

There is no dispute that the union placed nails and tacks at the entranceways to plaintiff's premises, shot an air pistol at the radiators and windshields of vehicles of approaching customers, blocked entranceways and refused to stand aside, and threatened physical injury and property damage to customers who attempted to enter or did enter plaintiff's premises. But the union seeks to avoid respon-

sibility for its acts by asserting that it falls within the proviso in §8(b) (4) (B).

> * * * *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

It should be emphasized, however, that the act states that primary picketing is not to be made unlawful "*where not otherwise unlawful.*" (Emphasis added.) Here, the union's acts involved interference with customers and their property and constituted, according to the laws of the states, trespass, assault and malicious mischief. Thus, the union's acts were unlawful but they were not made unlawful by clause (B). Neither can they be made lawful by said clause. *Steelworkers,* cited by Judge Castle, recognized this in effect when, at pages 501-502, the court said:

> "* * * This is not to say, of course, that violent primary picketing is in all respects legal but only that it is not forbidden by § 8(b)(4); it would escape neither the provisions of the federal law nor the local law if violative thereof."

Where the record indicates that the acts were unlawful, the union had the burden of proving their lawfulness. This it did not do; it made no attempt to do so.

It is clear that the proviso in clause (B) did not exculpate the union from the effect of its unlawful primary picketing in this case.

I would reverse the order of the district court.

APPENDIX B.

JUDGMENT.

The Court having submitted its Findings of Fact and Conclusions of Law it is hereby Ordered, Adjudged and Decreed that plaintiff take nothing under its complaint and plaintiff's cause of action is hereby dismissed with costs assessed in favor of defendant in the amount of $.....

Dated this 7th day of July, 1965.

CALE J. HOLDER,
Judge, United States District Court Southern District of Indiana.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above captioned cause came before the Court for trial without a jury and both parties having offered evidence, having rested, and having argued their respective positions, the trial was concluded. The Court having considered said evidence and arguments, does now submit its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

1. Plaintiff, Bedford-Nugent Corporation, was at all times material to this action an Indiana corporation, having its principal office and place of business in Evansville, Indiana, and was engaged principally in the business of extraction and preparation of river sand and gravel in the Ohio River Valley area for sales throughout the state and in interstate commerce. Plaintiff conducted its oper-

ations at premises in Evansville, Indiana, Rockport, Indiana, and Henderson, Kentucky, and its interstate business was sufficiently substantial so as to be characterized as an industry affecting commerce for jurisdictional purposes.

2. Defendant, Teamsters Local Union No. 215 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was at all times material to this action an unincorporated association and labor organization and its duly authorized agents and officers were engaged in representing and acting for its employee members within the Evansville Division of this Court's District.

3. Defendant, Teamsters Local Union No. 215, which was not the certified bargaining representative of plaintiff's emplyees, commenced picketing plaintiff's premises at Evansville, Indiana, Rockport, Indiana, and Henderson, Kentucky, by and through its agents on or about September 26, 1961. Said picketing was joined in by some of plaintiff's employees who were members of defendant union and continued until November 7, 1961. Defendant also picketed plaintiff's premises at two (2) subsequent periods of time but this picketing is not material since plaintiff has abandoned any claim with respect to this subsequent picketing.

4. In addition to picketing plaintiff's premises during the period of September 26, 1961 through November 7, 1961, defendant union by and through its agents also engaged in other activities at the primary sites. Said activities included the placing of nails and tacks at the entranceways to plaintiff's premises, the shooting of an air pistol at the radiators and windshields of approaching customers, the blocking of entranceways by pickets who refused to stand aside, and the threatening of physical

injury and property damage to customers who attempted to enter or did enter plaintiff's premises.

5. Although defendant's activities did not stop all customers from entering plaintiff's premises, it did have the effect of deterring a substantial number.

6. The activities of defendant, referred to in findings three (3) and four (4), were committed in part for the purpose of inducing customers to refuse to transport or otherwise handle plaintiff's goods and materials, or to perform any services, or in order to threaten, coerce or restrain plaintiff's customers. The object of said activities was to force such customers to cease doing business with plaintiff and to force plaintiff to recognize defendant as the representative of plaintiff's employees.

7. Plaintiff's sole theory of action is for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, Title 29 U. S. C. A. Section 187.

Conclusions of Law.

1. This Court has jurisdiction over the parties and subject matter of this action under Section 303 of the Labor Management Relations Act, Title 29 U. S. C. A. Section 187.

2. The conduct of defendant union during the period in question at plaintiff's primary premises was reprehensible and contrary to the spirit of an orderly and peaceful approach to labor-management disputes which is the declared policy of the Labor Management Act. However, whatever the Court's general reaction to defendant's conduct may be, the Court in this instance is limited to evaluating such conduct solely in the light of plaintiff's declared theory of action. Plaintiff has founded his action solely upon Section 303 of the Labor Management Relations Act, Title 29 U. S. C. A. Section 187. This section does not provide for general relief for any activity of a labor organ-

ization which is defined as an unfair labor practice under any sub-paragraphs of Title 29 U. S. C. A. Section 158(b), but rather provides relief only for that activity declared to be an unfair labor practice under sub-paragraph (4) of Title 29 U. S. C. A. Section 158(b). Irrespective of how reprehensible this Court regards defendant's conduct and irrespective of how this Court would construe defendant's conduct under Section 158(b)(4) if this case had been one of first impression, this Court is compelled to follow the precedents of those Courts superior to this one. This Court believes the United States Supreme Court Opinion in *United Steelworkers of America* v, *National Labor Relations Board*, 376 U. S. 492, 84 S. Ct. 899 (1964) to be controlling of the questions at bar. As in the steelworkers case, the activities of defendant union in this case clearly fall within clauses (i) and (ii) of Section 158(b)(4); likewise the objective of the defendant is covered by subsection (B), exclusive of the proviso thereto. The question whether the activities of the defendant, although literally within the definition of secondary activities contained in clauses (i) and (ii) of Section 158(b)(4), are nevertheless within the protected area of primary picketing carved out in the proviso to subsection (B) was decided by the Supreme Court in favor of labor organizations. The Court also indicated that even if such activity was violent, such would not be a violation of Section 158(b)(4). Thus, the Court finds that whether or not defendant may have violated some other federal or state law, defendant did not commit an unfair labor practice as defined in Title 29 U. S. C. A. Section 158(b)(4).

Dated this 7th day of July, 1965.

CALE J. HOLDER,
Judge, United States District Court Southern District of Indiana.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 185

BEDFORD-NUGENT CORPORATION,
AN INDIANA CORPORATION,
Petitioner,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD J. FILLENWARTH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1367.

BEDFORD-NUGENT CORPORATION,
AN INDIANA CORPORATION,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 215, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

I.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on March 3, 1966, and is reported in 358 F. 2d 21; it is also set forth as Appendix A, on pages 19 to 26 of the Petition; the Judgment, and Findings Of Fact And Conclusions Of Law of the United States District Court for the Southern District of Indiana,

Evansville Division, are not reported, but such are set forth in Appendix B, on pages 27 to 30 of the Petition.

II.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 3, 1966; the Petition was filed herein on May 31, 1966. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

III.

STATUTE INVOLVED.

Section 303 of the Labor Management Relations Act, 1947, as amended, which reads as follows:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."
>
> (June 23, 1947, c. 120, Title III, Section 303, 61 Stat. 158; Sept. 14, 1959, Pub. L. 86-257, Title VII, Section 704(e), 73 Stat. 545; 29 U. S. C. Section 187.)

Section 158 (b)(4) of the National Labor Relations Act, as amended, insofar as it is herein pertinent, reads as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(July 5, 1935, c. 372, Section 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, Section 101, 61 Stat. 140; Oct. 22, 1951, c. 534, Section 1(b) 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, Section 201(e), Title VII, Sections 704(a)-(c), 705(a), 73 Stat. 525, 542, 547; 29 U. S. C. Section 158(b)(4)(B).)

IV.

QUESTION PRESENTED.

Whether the primary activities of Respondent, a labor organization, at the premises of Petitioner were in violation of Section 8(b)(4) (i) and (ii) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4) (i) and (ii), and if so, whether such were, nevertheless, within the protected area of primary picketing carved out in the proviso of Section 8(b)(4)(B) of the Act, 29 U. S. C. 158 (b)(4)(B).

V.

STATEMENT OF THE CASE.

Petitioner was an Indiana corporation, having its principal office and place of business in Evansville, Indiana; it was engaged in the business of extraction and preparation of river sand and gravel in the Ohio River Valley area for sales throughout the state and in interstate commerce, but Petitioner *conducted its operations at premises in Evansville,* Indiana, *Rockport,* Indiana, *and Henderson,* Kentucky. (P. A. 27-8).

Respondent was a labor organization and was not the certified bargaining representative of Petitioner's employees; it *commenced picketing plaintiff's premises at Evansville,* Indiana, *Rockport,* Indiana, *and Henderson,* Kentucky, by and through its agents on or about September 26, 1961, and the picketing was joined in by some of Petitioner's employees, who were members of Respondent union, and the picketing continued until November 7, 1961. (P.A. 28).

In addition to *picketing Petitioner's premises,* Respondent also engaged in other activities *at the primary sites,* such as the placing of nails and tacks *at the entranceways to plaintiff's premises,* etc. (P.A. 28-9); the activities of Re-

spondent were committed *in part* for the purpose of inducing customers to refuse to transport or otherwise handle goods or materials of Petitioner (P.A. 29).

Petitioner's *sole theory of action* was for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, Title 29 U. S. C. 187 (P. A. 29), which provides *only* (P. A. 29-30) for that activity declared to be an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4).

The cause was heard by the trial court without a jury (P.A. 27), and the court found that Respondent did not commit an unfair labor practice as defined in 29 U. S. C. 158(b)(4) of the Act (P. A. 30), and thereafter the court entered judgment that Petitioner's cause of action be dismissed (P.A. 27).

On March 3, 1966, the U. S. Court of Appeals for the Seventh Circuit affirmed the judgment of the trial court (P. A. 19-26; 358 F. 2d 21).

VI.

SUMMARY OF ARGUMENT.

Petitioner's sole theory of action was for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, 29 U. S. C. 187, which provides damages only for that activity declared to be an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4).

The trial court found that this case involves only picketing and activities at the premises of the Petitioner, i.e., only primary picketing and primary activity at the premises of Pettioner. The activity herein does not involve common situs or separate gate picketing or activities, or

the contacting of customers, employees of customers, or others away from the picket lines. Since Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4), is not directed at primary picketing and primary activity, and since Respondent was engaging only in primary picketing and primary activity at the premises of Petitioner, then such primary picketing and primary activity of the Respondent herein are not within the proscription of Section 8(b)(4), and especially is such so, in view of the proviso to Section 8(b)(4).

Section 303, 29 U. S. C. 187, does not provide for general relief for any activity of a labor organization, but was designed to vest the Federal District Courts with jurisdiction of suits for damages against unions in only a limited class of unfair labor practices; if Respondent has engaged in any unlawful primary activity, redress for such must be found under the provisions of some law other than Section 303.

Merely because customers, and employees of customers, or others, came to the picket line as conducted by Respondent at the primary premises of Petitioner, and merely because such persons turned away, or were turned away by the primary activities of Respondent, neverthless secondary activity is not automatically thereby involved; customers and employees of customers who sought entrance to the premises of Petitioner obviously approached such premises with a mission contributing to the operations of the Petitioner, for undoubtedly customers are essential to the continued operation of the business of Petitioner.

In reaching its decision in the instant case, the Court of Appeals for the Seventh Circuit did not decide a question which had not been heretofore decided by this Court; nor, did the Court of Appeals decide a question in conflict with applicable decisions of this Court, for, in a least three instances, this Court has rather conclusively stated that

primary picketing and primary activities, as carried on by Respondent at the primary premises of Petitioner, do not constitute a violation of Section 303, 29 U. S. C. 187, or Section 8(b)(4), 29 U. S. C. 158(b)(4).

VII.

ARGUMENT.

1.

Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4), is not directed at primary picketing and primary activity; respondent was engaged only in primary picketing and primary activity at the premises of petitioner, which primary picketing and primary activity are not within the proscription of Section 8(b)(4), and especially is such so, in view of the proviso to Section 8(b)(4).

Among other things, the trial court found: that Respondent was not the certified bargaining agent of Petitioner's employees, and that Respondent picketed the three primary sites or premises of Petitioner at Evansville and Rockport, Indiana, and Henderson, Kentucky; that the picketing was joined in by some of Petitioner's employees who were members of Respondent Union; in addition to the picketing of Petitioner's premises, Respondent engaged in other activities at the primary sites, including the placing of nails and tacks at the entranceways to Petitioner's premises, etc., which activities were committed in part for the purpose of inducing customers to refuse to transport or otherwise handle Petitioner's goods and materials; and, that Petitioner's sole theory of action was for compensatory damages as provided for in Section 303 of the Labor Management Relations Act, as amended, 29 U. S. C. 187. (P. A. 27-29).

From the above facts the trial court concluded, among other things: that whatever the court's general reaction to Respondent's conduct might be, nevertheless the court was limited to evaluating such conduct solely in the light of Petitioner's declared theory of action, and the Petitioner founded its action solely upon Section 303 of the Labor Management Relations Act, as amended, 29 U. S. C. 187; that this section does not provide for general relief for any activity of a labor organization, but rather provides relief only for that activity declared to be an unfair labor practice under 29 U. S. C. 158(b)(4); that whether or not Respondent may have violated some other federal or state law, it did not commit an unfair labor practice as defined in 29 U. S. C. 158(b)(4); (P. A. 29-30).

The Court of Appeals for the Seventh Circuit concluded, among other things: that this case involves only picketing and activities at the premises of the Petitioner; that this case does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines; (P. A. 21-2; 258 F. 2d 21-23); that customers and employees of customers, who seek entrance to the primary employer's premises, approach such situs with a mission "contributing to the operations" of the primary employer; that customers are essential to the continued operation of Petitioner's business; that to deter them from entering Petitioner's premises is certainly an application of economic pressure at the primary situs; that the *Steelworkers* case (376 U. S. 492) is dispositive of the issue here; that both the situs and the object of the picketing were primary and therefore the Respondent's conduct, although reprehensible, did not constitute an unfair labor practice as defined in Section 8(b)(4); P. A. 23-24; 258 F. 2d 21-24); and, that redress for the unlawful aspect of such primary picketing must be found under the provisions of some law other than Section

303 (29 U. S. C. 187), which is designed to vest the federal district courts with jurisdiction of suits for damages against unions in but a limited class of unfair labor practices (P. A. 25; 258 F. 2d 21-25).

This Court, as noted by the District Court and the Court of Appeals in their respective opinions in the instant case, has heretofore decided the question involved in this proceeding. (P. A. 30; P. A. 23; 258 F. 2d 21-24).

In the case of *National Labor Relations Board* v. *International Rice Milling Company, Inc., et al.* (1951), 341 U. S. 665-666-667-671-672; 95 L. Ed. 1277-1279-1282, this Court stated:

> "The question presented is whether a union violated Section 8(b)(4) of the National Labor Relations Act, as amended by the Labor Management Relations Act (June 23) 1947), under the following circumstances: Although not certified or recognized as the representative of the employees of a certain mill engaged in interstate commerce, the agents of the union picketed the mill with the object of securing recognition of the union as the collective bargaining representative of the mill employees. In the course of their picketing, the agents sought to influence, or in the language of the statute they 'encouraged,' two men in charge of a truck of a *neutral customer* of the mill to refuse, in the course of their employment, *to go to the mill for an order of goods.* For the reasons hereinafter stated, we hold that such conduct did not violate Section 8(b)(4). (341 U. S. 665-6-7). (Emphasis added).
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> "• • • There were no inducements or encouragements applied elsewhere than on the picket line. • • •. (341 U. S. 665-671).
>
> "In the instant case the violence on the picket line is not material. The complaint was not based upon that violence, as such. To reach it, the complaint more properly would have relied upon Section 8(b)(1)(A) or would have addressed itself to local au-

thorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with Section 8(b)(4). It is the object of union encouragement that is proscribed by that section rather than the means adopted to make it felt." (341 U. S. 665-672).

In the case of *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al:* (1961), 366 U. S. 667-672-673-680-681; 6 L. Ed. 2d 592-597-601-602; 81 S. Ct. 1285, commonly referred to by this Court as the *"General Electric Case"* in 376 U. S. 492-496, the Court reviewed extensively N. L. R. B. Decisions and its own Judicial Decisions with respect to primary and secondary picketing, ambulatory picketing, common situs picketing, and separate gate picketing; in such case, the union called a strike and picketed all gates leading to the extensive premises of General Electric, including a gate, that some six (6) or seven (7) months prior to the strike had been designated as "Gate 3-A For Employees Of Contractors Only—G. E. Employees Use Other Gates." The said "Gate 3-A" was some 550 feet away from the nearest entrance available for General Electric employees, suppliers, and deliverymen; the Court ordered that "the case must be remanded by the Court of Appeals to the Board" (366 U. S. 667-682), for it appeared in reaching their respective decisions, that the Board and the Court of Appeals "did not take into account that if Gate 3-A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of Section 8(b)(4)(A)." (366 U. S. 667-682).

With respect to Section 8(b)(4), this Court in said case stated:

"This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. 'While Section 8(b)(4) does not expressly mention "primary" or "secondary" disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's "secondary" boycott sections.' *NLRB* v. *Denver Bldg. and Constr. Trades Council*, 341 U. S. 675, 95 L. Ed. 1284-1294, 71 S. Ct. 943. * * *. Thus the Section 'left a striking labor organization free to use persuasion, including picketing, *not only on the primary employer and his employees, but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing* with them * * *.'" (366 U. S. 667-672.) (Emphasis added.)

* * * * *

"From this necessary survey of the course of the Board's treatment of our problem, the precise nature of the issue before us emerges. With due regard to the relation between the Board's function and the scope of judicial review of its rulings, the question is whether the Board may apply the Dry Dock criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises. The effect of such a holding would not bar the union from picketing at all gates used by *employees, suppliers, and customers* of the struck employer. * * *." (336 U. S. 667-680.) (Emphasis added.)

In the case of *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492-498-499; 11 L. Ed. 2d 863-867-868, a union picketed not only the several entrances to an employer's plant, but also picketed a so-called "railroad gate" entrance, opening onto a railroad spur, which spur ran to the struck bound employer's premises and was also used to serve the railroad needs of other companies; the union picketed at the "railroad gate" when the railroad began to move railroad

cars to or from the struck bound employer, but did not picket when the railroad moved cars to or from the other companies located on the spur.

Wtih respect to such facts, this Court, among other things stated:

> "The activities of the union in this case clearly fall within clauses (i) and (ii) of Section 8(b)(4); likewise the objective, to induce the railroad to cease providing freight service to Carrier for the duration of the strike, is covered by the language of subsection (B), *exclusive of the proviso. The question we have is whether the activities of the union, although literally within the definition of secondary activities contained in clauses (i) and (ii) of Section 8(b)(4), are nevertheless within the protected area of primary picketing carved out by Congress in the proviso to subsection (B).* (376 U. S. 492-496.) (Emphasis added.)
>
> "The dividing line between forbidden secondary activity and protected primary activity has been the subject of intense litigation both before and after the 1959 amendments to Section 8(b)(4), which broadened the coverage of the section *but also added the express exceptions for the primary strike and primary picketing.* We need not detail the course of this sometimes confusing litigation; for in the *General Electric* case, supra, (366 U. S. 667, 6 L. Ed. 2d 592, 81 S. Ct. 1285), the Court undertook to survey the cases dealing with picketing at both primary and secondary sites and the result reached in that case largely governs this one. * * *. (376 U. S. 492-496.) (Emphasis added.)
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>
> "Although the picketing in the *General Electric* case occurred prior to the 1959 amendments to Section 8(b)(4), the decision was rendered in 1961 and the Court bottomed its decision upon the amended law and its legislative history. *We think General Electric's construction of the proviso to Section 8(b)(4)(B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations*

> *of the struck employer.* But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been *aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.* * * *." (376 U. S. 492-498-9.) (Emphasis added.)

In short, Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158 (b) (4), is not directed at primary picketing and primary activity, and, especially is such so in the light of the proviso to Section 8(b)(4), as heretofore determined by this Court.

Respondent was engaged only in primary picketing and primary activity at the premises of the Petitioner; therefore such does not come within the proscription of Section 8(b)(4), and especially is this true in view of the proviso thereto.

Petitioner very generally asserts in the last paragraph on page 17 of its Petition, that "If the decision in this case is allowed to stand, a labor organization may, with impunity and practically without limitation, insofar as Federal labor law is concerned, threaten, coerce and restrain customers of a primary employer for the object of forcing such customers to cease doing business with the primary employer, so long as the union activity is confined to the premises of the primary employer."

It was clearly found by the District Court: that Petitioner's theory of action was founded solely upon Section 303 of the Labor Management Relations Act, 29 U. S. C. 187; that said Section does not provide for *general relief for any activity* of a labor organization; and, that whether or not Respondent "may have violated some other federal or state law," Respondent "did not commit an unfair

labor practice as defined in Title 29 U. S. C. A. Section 158 (b) (4)," (P. A. 29-30).

With respect to the above quoted very general statement of Petitioner, the Court of Appeals for the Seventh Circuit appropriately concluded that "Accordingly, redress for the unlawful aspect of such primary picketing must be found under the provisions of some law other than Section 303 which is designed to vest the federal district courts with jurisdiction of suits for damages against unions in but a limited class of unfair labor practices." (P. A. 25; 358 F. 2d 21-25).

This Court has heretofore come to the same conclusion. *National Labor Relations Board* v. *International Rice Milling Company, Inc., et al.* (1951), 341 U. S. 665-672-673; 95 L. Ed. 1277-1282-1283; *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492-501-502; 11 L. Ed. 2d 863-869, 84 S. Ct. 899.

2.

Primary picketing and primary activity by Respondent at the premises of Petitioner, did not Constitute an unfair labor practice as proscribed by Section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. 158(b)(4), and the proviso thereto, merely because employees of Petitioner, employees of other employers, customers of Petitioner, employees of customers of Petitioner, or suppliers of Petitioner, came to the premises of Petitioner and turned away or were turned away by the primary picketing and primary activity.

Petitioner consistently asserts in its Petition; by some circuitous reasoning, that since the primary picketing and primary activity at the premises of Petitioner were conducted "in part for the purpose of inducing customers to refuse to transport or otherwise handle" Petitioner's goods

and materials, then such primary picketing and primary activity became secondary picketing and secondary activity as proscribed in Section 8(b)(4).

In its Petition herein, as before the Court of Appeals for the Seventh Circuit, Petitioner relies extensively on the case of *Local 20, Teamsters, Chauffeurs and Helpers Union, etc.* v. *Lester Morton, d/b/a Lester Morton Trucking Co.* (1964), 377 U. S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280; Petitioner also contends before this Court, as it did before the Court of Appeals, that the case of *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.* (1961), 366 U. S. 667, 81 S. Ct. 1285, 6 L. Ed. 2d 592, commonly referred to as the *General Electric* case, and, the case of *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492, 84 S. Ct. 899, 11 L. Ed. 2d 863, commonly referred to as the *Steelworkers* case, "are distinguishable from the instant case and should not control" (P. B. 8); with respect to all of the above, the Court of Appeals rather tersely stated that "(the *General Electric* case), in which the Court took occasion to survey the cases dealing with picketing at both primary and secondary sites, convinces us that it is *Steelworkers* which is controlling here and that *Morton* is distinguishable." (P. A. 23; 358 F. 2d 21-24.)

The Court of Appeals, somewhat pointedly, went on to state that Petitioner's

> "* * * reliance on *Morton* is misplaced. The facts there involved, as disclosed in the District Court's opinion (200 F. Supp. 653, 659 and 600), reveal that contacts were made by the union representatives with the employees of O'Connel Coal Company, a customer of the primary employer, not at the latter's premises but at sites away from the primary picket line. Such activity was secondary and not affected by the proviso to subsection (B). And it was the away from the prim-

ary situs feature of the activities which was controlling as to the O'Connel phase of the *Morton* case." (P. A. 24; 358 F. 2d 21-24.)

With respect to the question of the approach by customers and employees of customers to the primary picketing and primary activity of Respondent at Petitioner's premises, the Court of Appeals quite decisively stated:

> "We think it obvious that customers and employees of customers who seek entrance to the primary employer's premises are likewise neutrals who approach the situs with a mission 'contributing to the operations' of the primary employer. Customers are essential to the continued operation of the plaintiff's business. To deter them from entering the plaintiff's premises is certainly an application of economic pressure at the primary situs. We agree with the District Court that *Steelworkers* is dispositive of the issue here presented. Both the situs and the object of the picketing were primary and therefore the Union's conduct, although reprehensible, did not constitute an unfair labor practice as defined in Section 8(b)(4)." (P. A. 23-24; 358 F. 2d 21-24.)

International Rice Milling (1951), 341 U. S. 665-667-671-672, the *General Electric* case (1961), 366 U. S. 667-672-673-680-681, and the *Steelworkers* case (1964), 376 U. S. 492-498-499, are, to use an expression of the District Court, "controlling of the questions at bar" (P. A. 30), and, to use an expression of the Court of Appeals, are "dispositive of the issue here presented" (P. A. 23; 358 F. 2d 21-24), as to customers and employees of customers approaching primary picketing or primary activity at the premises of Petitioner.

3.

The instant case involves only primary picketing and primary activity at the premises of Petitioner, and therefore does not involve in any way common situs picketing, separate construction gate picketing, railroad gate picketing, moving a primary picket from the primary premises to a construction site some distance away from the primary picketing, moving a primary picket from the primary premises to the premises of a secondary employer, or contacting the employees of a secondary employer away from the primary picket line.

On pages 13 to 17 of the Petition, several cases are cited and rather abstract portions are quoted therefrom; in addition thereto, Petitioner sets forth general statements of its own as to what the decided cases hold; as for example, on pages 15 and 16 of the Petition, it is quite authoritatively stated by Petitioner that "*In Local 20, Teamsters, Chauffeurs & Helpers Union, etc.* v. *Lester Morton* (1964), 377 U. S. 252, the inducement of customers to cease doing business with the primary employer was held to be violative of Section 303. * * *. Although the District Court opinion in the *Morton* case does mention the 'away from the primary situs' facts, 200 F. Supp. 659, nothing in the opinion indicates that the location of the activities was considered to be decisive. Likewise, these facts were not relied upon by the Court of Appeals in the *Morton* case, 320 F. 2d 505. This Court did not even mention these so-called 'controlling' facts when affirming the award of damages based upon the O'Connel incidents. 377 U. S. 252."

An examination of the opinion of this Court in the *Morton* case, does not disclose clearly the "customer" facts involving the O'Connel Company; however, the District Court's opinion in the case of *Morton* v. *Local 20, Team-*

sters, Chauffeurs, and Helpers Union, etc. (U. S. D. C. N. D. of Ohio, W. D., 1961), 200 F. Supp. 653, readily discloses that representatives of the union alerted and contacted employees of the O'Connel Company *away from the picket line* by means of the telephone and personal visits (200 F. Supp. 653-659), thereby making such activity *secondary* in character. The facts in the *Morton* case as to "customer" O'Connel Company are not at all like the "customer" facts in the instant case; the only picketing and the only activity in the case at bar was at the premises of the Petitioner; all of the picketing and the activity herein was primary, even with respect to those "customers" of Petitioner who came up to the picket line at the premises of Petitioner and turned away, or were turned away.

The Court of Appeals for the Seventh Circuit in the instant case (P.A. 24; 358 F. 2d 21-24), has very aptly responded to Petitioner's *general* assertions as to Petitioner's concept of the decision of this Court in the *Morton* case, when said court stated that "Plaintiff's (Petitioner's) reliance on *Morton* is misplaced. * * *. And it was the away from the primary situs feature of the activities which was controlling as to the O'Connel phase of the *Morton* case"

Petitioner has generally attempted to misconstrue the ruling of this Court in *International Rice Milling* (341 U. S. 665), and, with respect to the cases of (a) *National Labor Relations Board* v. *Denver Building and Construction Trades Council, et al.* (1951) 341 U. S. 675, (b) *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board* (1951), 341 U. S. 694, and (c) *Local 74, United Brotherhood of Carpenters and Joiners, et al.* v. *National Labor Relations Board* (1951), 341 U. S. 707, Petitioner has indiscretely but rather blatantly asserted on page 15 of the Petition that "In each of these cases, this Court found 8(b)(4) violations, notwithstanding that all activity was at the primary premises."

In response to the above "general" statement of Petitioner, suffice it to say, that *Denver Building Trades* case (341 U. S. 675) involved *common premises or common situs picketing at a construction site,* wherein the unions (Building Trades Council) erected a picket at a construction site because an electrical subcontractor employed nonunion workmen, and the picket sign was directed at the entire job, for it read: "This job unfair to Denver Building and Construction Trades Council." Aside from other differences involved in the *Denver* case, the picketing was not at the primary premises of the electrical subcontractor.

As to the *Electrical Workers, Local 501* case (341 U. S. 694) such again involved common premises or common situs picketing at a construction site; the general contractor subcontracted the electrical work to an electrician who employed nonunion electricians; the construction site was at Greenwich, Connecticut, and the principal place of business of the electrical subcontractor was at Port Chester; the picket sign in this case was likewise directed at the entire construction job, for it read: "This job is unfair to organized labor." And, as stated above with respect to the *Denver Building* case, aside from other differences in the case, the picketing in *Electrical Workers, Local 501* was not at the primary premises of the electrical subcontractor.

In the *Carpenters, Local 74* case (341 U. S. 707) the union maintained a picket in front of Watson's store from the latter part of March until August 28, 1947, which picket placards announced that Watson's was "unfair to organized labor" or that "This store employs non-union labor." On August 7, 1947, one Stanley contracted with one Parker to renovate and improve a dwelling near Chattanooga; Parker subcontracted the installation of the wall and floor covering to Watson, and on one occasion the union representative came to the Stanley job site and instructed the union carpenters working for Parker, that they could no

longer work with nonunion men; at intervals the union carpenters walked off the job; as mentioned above with respect to the *Denver Building* and *Electrical Workers* cases, aside from other differences, the picketing at Watson's premises in Chattanooga was not affected in any way, as the *Complaint* by the N. L. R. B. was against the union's "*extension* of their activities to the Stanley project by there ordering a strike" (341 U. S. 712), i.e., illegal activity, as contended by the N. L. R. B. and this Court, which was the picketing conducted away from the primary premises of Watson.

Petitioner likewise generally cites the cases of *United Brick and Clay Workers of America, et al.* v. *Deena Artware, Inc.* (C. A. 6, 1952), 198 F. 2d 637, cert. den., (1953), 345 U. S. 906, *Construction and General Laborers Local Union No. 438, AFL-CIO* v. *Hardy Engineering And Construction Company, Inc.* (C. A. 5, 1965), 354 F. 2d 27, and *Superior Derrick Corporation* v. *National Labor Relations Board* (C. A. 5), 278 F. 2d 891, cert. den. 364 U. S. 816.

In the *Deena Artware* case, said company had a place of business located on the southwest corner of a certain tract of ground; following a failure to reach a collective bargaining agreement with the union, a strike took place and picketing was commenced on or about May 26, 1948; on or about December 8, 1947, the company entered into a contract with an independent general contractor to erect a new manufacturing plant and warehouse on the company property, north of the old company plant and warehouse; the union picketed not only the entrances to the old plant and warehouse but also picketed the new construction to the north of the existing plant and warehouse; thus the picketing involved neutral employers and neutral employees thereof, who were not engaged in performing day to day operations of the company, and on such basis is

quite different from the facts involved in the case at bar (366 U. S. 667; 376 U. S. 492).

In the *Hardy Engineering* case, the company was the general contractor engaged to construct a school on a large irregularly shaped tract of land; the McKinney Drilling Company, a secondary employer, was under a contract with Hardy Engineering to perform some foundation work; Hardy's employees, at the time, were common laborers, who were not represented by any union, and used a roadway which opened on Westview Drive; the employees of McKinney, the secondary employer, entered and left the grounds by way of an entrance on Fair Street; there was a conflict in the testimony as to the proximity of the areas in which the employees of the respective employers worked, which conflict was resolved in favor of Hardy by the trial court, and the evidence showed that Hardy's employees were working in an area far removed from the Fair Street entrance; the union endeavored to persuade Hardy to adopt the union scale, and when such effort proved unsuccessful, the union placed pickets at the Fair Street entrance, as used by the secondary employees, and not at the Westview Drive, as used by the employees of Hardy, the primary employer; thus, the picketing was not placed at the primary entrance of Hardy, the primary employer, but placed at the entrance used by secondary employers and secondary employees, and therefore the *Hardy Engineering* case is quite different from the case at bar.

The case of *Superior Derrick,* involved an unsuccessful effort on the part of the union to organize the employees of that company; picketing was conducted at a wharf, and a gangway was the only means by which union longshoremen could board a ship and by which employees of the company could go from shore onto a company barge; during a lunch hour, the union erected a picket at the foot of the gangway and when the longshoremen returned, they refused to cross

the picket line; the court held that it was a duty of the union to advise the longshoremen that the union was not picketing the ship, but, in any event, at least there was a common situs involved in the *Superior Derrick* case, which again, as stated above with respect to the other cases cited by Petitioner, clearly distinguishes it from the case at bar.

Apparently, Petitioner has been unable to find any authority to sustain its position, for all the authority, and particularly the decisions of this Court, are in support of the position of the Respondent, as clearly enunciated by the District Court (P. A. 29-30), and the Court of Appeals for the Seventh Circuit (P. A. 19-26; 358 F. 2d 21).

The case at bar, as heretofore stated, involves only primary picketing and primary activity at the premises of Petitioner; or, to use the clear and succinct statement of the Court of Appeals (P. A. 21-22; 358 F. 2d 21-23):

> "It is apparent from the court's factual findings that this case involves only picketing and activities at the premises of the employer. It does not involve common situs or separate gate picketing or activities, or the contacting of customers, employees of customers, or others, away from the primary picket lines at the employer's premises."

4.

The Court of Appeals for the Seventh Circuit has not decided in the instant case, a question which has not been heretofore settled by this Court, and the Court of Appeals has not decided in the instant case, a question in conflict with applicable decisions of this Court.

Petitioner contends the Court of Appeals has decided a question in the instant case, which heretofore has not been, but should be settled by this Court; or, Petitioner contends in an alternative effort, that the Court of Appeals

has decided a question in a way in conflict with applicable decisions of this Court.

In opposition to such alternative positions of Petitioner, the Respondent incorporates hereunder, the preceding portions of its Argument herein, and for the sake of brevity, again respectfully cites as applicable dispositive decisions of this Court on the issue herein, the cases of *National Labor Relations Board* v. *International Rice Milling, Inc., et al.* (1951), 341 U. S. 665-666-667-672; 95 L. Ed. 1277-1279-1282; *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.* (1961), 366 U. S. 667-672-673-680-681; 6 L. Ed. 2d 592-597-601-602; 81 S. Ct. 1285; *United Steelworkers of America, AFL-CIO, et al.* v. *National Labor Relations Board, et al.* (1964), 376 U. S. 492-498-499; 11 L. Ed. 2d 863-867-868.

VIII.

CONCLUSION.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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